Federal Court  Cour fédérale

Date: 20151214

Docket: T-2028-15

Citation: 2015 FC 1382

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, December 14, 2015

PRESENT: Mr. Justice Locke

BETWEEN:

LAURENTIAN PILOTAGE AUTHORITY

Plaintiff

and

CORPORATION DES PILOTES DU SAINT-LAURENT CENTRAL INC.

Defendant

ORDER AND REASONS

I. Overview

[1] This judgment is further to a motion filed by the plaintiff, the Laurentian Pilotage Authority (LPA), in order to:

1. Allow the motion for an interlocutory injunction filed by the plaintiff, the Laurentian Pilotage Authority;

2. Order the defendant, the Corporation des pilotes du Saint-Laurent Central Inc., to include, by December 18, 2015, in the work schedule of its licensed pilots in District No. 1, the names of a sufficient number of pilots to ensure that the duty roster from December 22, 2015, to January 4, 2016, inclusive comprises the following staff per sector per day:

    a. Sixty percent (60%) of the licensed pilots on the duty roster;

    b. Three (3) pilots on compensatory leave, except on December 24, December 25, December 31 and January 1.

3. Order the respondent to pay the costs applicable to this injunction;

4. Render any other order that the Court deems necessary;

5. Exempt the moving party from the application of these rules.

[2] Section 18 of the *Pilotage Act*, RSC 1985, c. P-14, stipulates that the LPA is the authority whose "objects. . . are to establish, operate, maintain and administer in the interests of safety an efficient pilotage service within the region" of "all Canadian waters in and around the Province of Quebec, north of the northern entrance to St. Lambert Lock except the waters of Chaleur Bay south of Cap d'Espoir in latitude 48 degrees 25 minutes 08 seconds N., longitude 64 degrees 19 minutes 06 seconds W."

[3] The defendant, Corporation des pilots du Saint-Laurent Central Inc. (the Corporation), exercises a monopoly over the pilotage services provided on the St. Lawrence River, upstream from Québec to Montréal.

[4] For many years, the LPA and the Corporation have entered into pilotage service contracts. On or about October 15, 2015, the parties signed a new agreement for the period from July 1, 2015, to June 30, 2020, which replaced the one for the period from July 1, 2012, to June 30, 2015. One of the main changes in the new contract is an increase in the number of pilots during the holiday period (from December 22 to January 4). According to the LPA, the purpose of this increase is to try to avoid the repetition of delays in the delivery of pilotage services experienced by clients during the holiday period, which is usually the busiest time of the year.

[5] The dispute between the parties is basically a disagreement on the interpretation of the new contract and, more specifically, the matter of knowing whether the new pilot assignment requirements can compel the Corporation to review the pilots availability schedule for 2015 (the 2015 Schedule) which, under the previous agreement between the parties, was provided in 2014. The parties agree that the 2015 Schedule does not meet the new requirements, but the Corporation is of the opinion that these new requirements do not invalidate the 2015 Schedule. Indeed, the Corporation is arguing that the new requirements concerning the holiday period will take effect starting next year.

[6] The LPA maintains that the new contract came into effect on October 15, 2015, that it was retroactive to July 1, 2015, and that no exception has been considered to maintain the 2015 Schedule for pilot assignments during the 2015-2016 holiday period despite the new requirements. The Corporation should therefore revise the 2015 Schedule in accordance with the new contract.

[7] The Corporation maintains that it was the parties' custom and usage that the availability schedule for one year (January to December) was not affected by the coming into effect of a new service contract (from July to June). The Corporation also alleges that, during the negotiation of the new contract, its counsel (André Baril) expressly confirmed with the LPA representatives that the new pilot assignment requirements during the holiday period would not affect the 2015 Schedule and would take effect only starting in 2016. This allegation is supported by the affidavits of Mr. Baril and of five other representatives of the Corporation who were present during the negotiations.

[8] The LPA responded with five affidavits from its own representatives present at the negotiations, each stating that the issue of maintaining the 2015 Schedule and postponing the application of the new pilot assignment requirements to 2016 was never raised during negotiations. The LPA also explains that the availability schedule was not modified in the past when a contract was renewed because an agreement had not been reached that affected the schedule. Consequently, there was no usage or custom between the parties with regard to changing the schedule or not.

[9] Essentially, the LPA is asking for an interlocutory injunction to force the Corporation to meet the new pilot assignment requirements during the 2015-2016 holiday period and to revise the 2015 Schedule accordingly.

II. Test

[10] The parties agree on the test to be met with respect to an interlocutory injunction. Further to the Supreme Court judgment in *RJR - Macdonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR – Macdonald*] at p. 335:

> First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.

[11] With regard to the serious issue, it is normally sufficient to demonstrate that the claim is neither frivolous nor vexatious. However, there is an exception in the case when the result of the interlocutory motion will in effect amount to a final determination of the action: *RJR - Macdonald* at p 338. In such a case, the tribunal should engage in a more extensive review of the merits of the case: *RJR - Macdonald* at p 339. In *Wang v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148 at para 11, Justice Pelletier explained the correct approach in such cases: "It is not that the tri-partite test does not apply. It is that the test of serious issue becomes the likelihood of success on the underlying application."

[12] With regard to the irreparable harm branch, the only issue is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application. The nature of the harm suffered should be considered rather than its magnitude.

[13] It is "the applicants' own interests that fall to be considered under this branch of the test, not that of third parties" (*Glooscap Heritage Society v Canada (National Revenue)*, 2012 FCA 255 at para 33).

[14] The third branch of the test concerns the balance of inconvenience and the public interest. It is at this point that the question of harm to third parties may be relevant.

[15] It is appropriate at this stage to recognize that, in contractual matters, the Court must attempt to preserve the status quo when the contractual interpretations are distinguishable (*Simplex Grinnell Inc c Cégep de Sainte-Foy*, 2012 QCCS 4512 at para 4).

III. Analysis

A. *Proceedings before the Court*

[16] I am satisfied that the LPA made all reasonable efforts to resolve this dispute before the holiday period as provided for in the contract and without the Court's involvement. I also agree that a settlement of said dispute after the holiday period is worthless for the LPA. Despite the LPA's efforts and without finding one party or the other in fault, they were unable to arrange to have an arbitrator to hear them and settle the dispute before the holiday period.

[17] In the circumstances and in the context of the agreement, I am satisfied that it is appropriate for me to decide this motion. The agreement provides for recourse to an arbitrator to resolve any dispute that may be settled amicably by the parties, but the agreement does not

exclude the Court's involvement in case of necessity. In fact, subsection 17.15 of the agreement expressly provides for the involvement of this Court when necessary.

[18] I note that the Corporation has no major objection to this Court deciding this motion. I will therefore consider the three branches of the test for an interlocutory injunction.

B. *Serious issue*

[19] The parties seem to agree on the fact that my decision on this motion for an interlocutory injunction would, in fact, be equivalent to a final decision. Regardless of whether I grant or dismiss the motion, the losing party will likely be unable to obtain a final decision by an arbitrator on the merits of the dispute before the end of the holiday period. Therefore, according to the case law, to decide whether there exists a serious issue to be tried, I will do a more thorough review of the merits of the case to determine whether it is likely that the underlying application may be allowed.

[20] I acknowledge that my interpretation of the contract on the issue of the retroactive effect of the new pilot assignment requirements is necessarily based on the limited evidence that was urgently prepared for this motion. It is possible that, after considering more complete evidence, an arbitrator having expertise in this area might reach a different conclusion on the interpretation of the contract.

[21] The parties' evidence is clearly in conflict with regard to their discussions concerning the maintenance of the 2015 Schedule. All of the Corporation's representatives indicate that this

topic was expressly discussed and all of the LPA's representatives claim the contrary. Without further evidence, I am not satisfied that such discussions took place.

[22] Moreover, I am not satisfied that the parties have custom and usage to the effect that the availability schedules of pilots for one year are not affected by the coming into effect of a new service contract.

[23] I therefore interpret the contract by considering only its wording.

[24] Subsection 18.01 indicates that the contract comes into force on July 1, 2015 and ends on June 30, 2020. Although several provisions in the contract indicate that they will not apply immediately (e.g. subsections 2.46 and 8.04), this is not the case of the new pilot assignment requirements. Nothing indicates that these requirements will not apply immediately or that the 2015 Schedule will be maintained. In fact, the contract provides for the possibility of the Corporation making changes to the pilot assignment schedule in subsection 4.01 of Appendix B to the contract.

[25] The Corporation maintains that it is impossible to change the pilot assignment schedule at mid-year because assignments at the start of the year have an impact on those later in the year. However, I am of the opinion that this argument is not completely accurate and is not supported by sufficient evidence. I reject this argument.

[26] It seems fairly clear that the provisions of the contract, in general, and the new pilot assignment requirements, in particular, have been the result of careful drafting after long and

detailed negotiations. If the Corporation had intended that the 2015 Schedule remain unchanged after the new contract commenced (notwithstanding the new requirements), it should have insisted on expressly stating this in the contract.

[27] In my opinion, it is likely that an arbitrator considering the merits of this dispute would have concluded that the Corporation must meet the new pilot assignment requirements despite the prior existence of the 2015 Schedule. I therefore find that the LPA has established that there is a serious issue to be tried.

C. *Irreparable harm*

[28] As I mentioned above, it is the nature of the harm to the LPA that is relevant and not its magnitude.

[29] The parties agree that the problem of delays caused by the unavailability of pilots goes a long way back. However, the parties cannot agree on either the magnitude of this problem or on whether the problem causes irreparable harm.

[30] The LPA's annual reports from 2008 to 2014 indicate that there are typically a number of delays every year caused by the unavailability of pilots. However, these same reports show that the number of delays of this type was less than the LPA's objective (0.1% of assignments) for the years 2009, 2010 and 2013 and was close to this objective for the years 2008 and 2012. For a long-standing problem, this one does not seem very serious. Consequently, the harm that it causes is minor.

[31] According to the reports, the number of delays rose in 2014, but I note that the LPA's evidence (the affidavit of Fulvio Fracassi dated December 2, 2015, at para 20) indicates that the number of delays decreased in 2014 compared with 2013. In any case, the evidence does not show a growing trend in delays due to pilot unavailability.

[32] The Corporation maintains that the LPA's argument that there will be delays during the holiday period this year is hypothetical. I disagree. After seeing the statistics for 2008 to 2014, it seems likely that there will be delays caused by pilot unavailability during the holiday period this year. It is difficult to estimate the number of delays, but I expect that there will be some.

[33] Although the problem of delays of this type is not very serious and the resulting harm is minor, I agree that harm of this type is irreparable. It is understandable that preventable delays will harm the LPA's reputation, which is an irreparable result: *RJR - Macdonald* at p. 341. For example, the LPA's clients affected by delays caused by pilot unavailability could choose other options to ship their products in the future. Even though there is no evidence that an LPA client has done this in the past, I think it is likely to have happened considering the number of delays in past years.

[34] The Corporation submits that, in another dispute between the parties which is currently before an arbitrator, the LPA is claiming pecuniary damages following a delay allegedly caused by pilot unavailability. The Corporation is arguing that this claim indicates that delays of this type, which may be subject to compensation, do not create irreparable harm. I do not accept this submission. The Corporation has not referred to any authority indicating that the fact of claiming pecuniary damages would be tantamount to the admission that the harm is not irreparable.

D. *Balance of inconvenience and the public interest*

[35] In this branch of the test to obtain interlocutory injunction relief, I must consider the inconveniences for the LPA if an injunction were not granted and weigh them against those for the Corporation if the injunction were granted. I must also consider the impact of my decision on the public interest.

[36] As I indicated in the previous section, the problem of delays caused by pilot unavailability does not appear very serious, and it has continued for a long time. Therefore, the inconvenience to the LPA if the injunction were not granted is not very significant.

[37] With regard to the public interest, this problem is also not very significant for the LPA's clients. I assume that, over the years, these clients have become fairly used to holiday period delays. As for the LPA's reputation, it appears to me that the negatives consequences have already occurred. Moreover, I am of the opinion that the evidence is insufficient to demonstrate that the situation increases navigation safety hazards.

[38] However, one aspect of public interest that supports granting an interlocutory injunction is the fact that, in my opinion, immediately after entering into a new agreement with the LPA, the Corporation refused to comply with the new pilot assignment requirements during the holiday season. There is a public interest in ensuring compliance with contracts.

[39] An argument in favour of dismissing this motion is the fact that the 2015 Schedule was prepared more than one year ago, and the pilots likely made their arrangements for the 2015–

2016 holiday period a long time ago. I agree that the Corporation was aware of the new pilot assignment requirements since June, but the inconvenience for pilots to have to change their arrangements is a relevant factor.

[40] I also note that the Corporation's evidence indicates that there are fewer ships upstream from St. Lambert Lock currently than on the same date in 2014. Moreover, the water temperature is higher. These two facts may indicate that the holiday period this year will be less busy than what the LPA expects, and there will therefore be fewer delays than anticipated.

[41] Each of the parties argues that the principle of maintaining the status quo goes in its favour. The Corporation maintains that the status quo means keeping the 2015 Schedule, whereas the LPA contends that the status quo requires compliance with the new contract between the parties. It is my view that the Corporation is correct. The LPA is asking that the Corporation be ordered to modify the 2015 Schedule. The status quo requires that I do not impose such an order.

[42] After having considered all of the parties' arguments, I am of the opinion that the balance of inconvenience favours the dismissal of the motion for an interlocutory injunction. In my opinion, the damage that the LPA may suffer, as well as the consequent damage to the public interest, is not as serious as the inconvenience that the Corporation and pilots would suffer if the injunction were granted.

IV. Conclusions

[43] Although the LPA has demonstrated that there is a serious issue to be tried and that it would likely suffer irreparable harm if its motion were dismissed, I am not satisfied that the balance of inconvenience and the public interest favour granting said motion. This motion is therefore dismissed.

[44] I order that the LPA pay the Corporation's costs applicable to this motion of $2,000.

ORDER

THE COURT ORDERS that this motion for interlocutory injunction be dismissed with costs of $2,000 payable by the Laurentian Pilotage Authority to the Corporation des pilotes du Saint-Laurent Central Inc.

"George R. Locke"
Judge

Certified true translation
Barbara McClintock, Certified Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2028-15
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